Case No. _____

UNITED STATES SUPREME COURT
1984 TERM

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC. and
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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# APPENDIX TO PETITION FOR CERTIORARI

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45 U.S.C. § 184

System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a

full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of seciton 3, Title I, or this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individaul carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent

National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similar limited jurisdiction.

29 U.S.C. § 160(b)

Complaint and notice of hearing -- Answer -- Court rules of evidence inapplicable

Whenever it is charged that any person has engaged or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the

service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said

proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 80-Z-1380

FRANK E. BARNETT,

Plaintiff,

v.

UNITED AIRLINES, INC., et al.,

Defendants.

Order of Dismissal

THIS MATTER is before the Court on Motion to Dismiss filed by defendant United Airlines, Inc., and a Motion for Summary Judgment filed by defendant Association of Flight Attendants. The Court has heard the arguments of counsel and had rendered oral conclusions of law contained herein by reference as if fully set forth. It is therefore

ORDERED that defendant United Airlines, Inc., Motion to Dismiss is granted and the action and complaint are

hereby dismissed without prejudice, each party to pay his or its own costs, and it is

FURTHER ORDERED that defendant Association of Flight Attendants' Motion for Summary Judgment is granted and the action and complaint are dismissed without prejudice, each party to pay his or its own costs, and it is

FURTHER ORDERED that the oral motion of plaintiff to dismiss Flight Attendants and Flight Stewards in the Service of United Airlines is granted and the action and complaint are dismissed without prejudice, each party to pay his or its own costs.

DATED at Denver, Colorado this 8th day of February, 1982.

BY THE COURT: /s/ Zita L. Weinshienk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 80-Z-1380

FRANK E. BARNETT,

Plaintiff,

vs.

UNITED AIRLINES, INC., et al.,

Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion to

Dismiss: Ruling)

THE COURT: What we have is a decision on which statute of limitations applies; and I think everyone has reached the agreement that in this area, since this is not a railway case, that the Federal statute does not apply. Section 3 is not applicable to air carriers, so we do have to look to State law to see which of the State statutes should apply, as

did the Supreme Court in United Parcel v. Mitchell.

United Parcel v. Mitchell, although under a different Federal statute, was a very analogous situation. It involved an arbitration hearing before an administrative panel. It involved a lawsuit then brought based on the failure of the union to represent the litigant at an arbitration and against the original party, although when the case came up to the Supreme Court, the union was not before the court. But the court very definitely in its decision, in United Parcel, is discussing both actions against the original party and against the union for failure to represent.

The Supreme Court indicates that although the respondent in that case did not style his suit as one to vacate the

award of the joint panel, if he's successful the suit will have that direct effect. The court goes on to indicate that the respondent was required -- that is, the respondent in United Parcel -- was required in some way to show that the union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract case. This makes the suit more analogous to an action to vacate an arbitration award than a straight contract action. The Supreme Court -- the majority of the court concludes with a policy decision.

"Given the choices present here and the undesirability of the result of the greivance and arbitral process being suspended in limbo for long periods, we think the District Court was correct when it chose the 90-day period imposed

by New York for the bringing of an action to vacate an arbitration award."

There are two possible statutes of limitation under State law. One is the 90-day statute similar to the New York statute to vacate an arbitration award. The other statute -- let me just give the cite on that -- that is 13-22-214.

The other statute is 13-80-106, entitled "Actions Under Federal Statute."

Were this a Colorado action under a Colorado arbitration, the policy would be very, very clear, and that would be you are required to bring your action to vacate an arbitration award within 90 days under the State statute.

If this action were exactly as it is framed against both the employer -- the original employer and against the union for breaching a duty of fair

representation, I don't think there would be any question but that the State philosophy would be that one is required to bring the action under 13-22-214, even though it might involve a tort action against the union. It is, as discussed by the Supreme Court, so wrapped up together with the fact that what is really being sought is the overturning of an arbitration award that the plaintiff would be required to come under that shorter State statute.

There is good public policy reasons for this State statute. Everyone knows that the courts are overcrowded. State and Federal Courts are overcrowded. Arbitration agreements are looked on with great favor in recent law; and in fact, parties are encouraged to participate in aribtration. Those arbitration decisions which are given,

by public policy also -- which is very clear in this statute -- to be brought to court promptly so that they can be settled and settled promptly.

We have a situation here where we don't have a State plaintiff. If we had a State plaintiff, I think there would be no question in this case. We have a plaintiff who brings the action under Federal jurisdiction, and I have no problem with the Federal jurisdiction. But the question is very strongly in my mind, even though this is clearly a case of Federal jurisdiction, whether that is one and the same as an action upon a liability created by a Federal statute.

This basically is an action under contract, fair representation of the union. It is an action which is implied under the Federal law certainly, but is this an action such as a 1982 or 1983

action where there is a liability created by Federal statute? I have serious questions whether it is.

We have, in other words, a general statute which talks about actions under a liability created by Federal statute, and it is very questionable in this Court's mind whether this is that type of action.

We have a very specific statute which indicates that where a party seeks to vacate an arbitration award, they must file the action very quickly. The question is which statute shall be applied.

The Supreme Court seems to indicate, not on precise facts but on very close, very analogous facts, that we apply the 90-day statute. In this case, the policy, I think, is the same policy as in the United Parcel v.

Mithcell case: That there is a public policy reason for having grievance and arbitration proceedings not be suspended in limbo for long periods of time. That public policy is relevant in this case just as much as it was relevant in United Parcel.

The court ruled that the statute that applies in Colorado is the 90-day statute, which requires one seeking to vacate arbitration awards to file within 90 days. Therefore, both motions should be granted.

I would also say by way of dictum that I think there are strong questions not in the malpractice area, where one discovers medical malpractice, but in an area where one is looking to the question of what date does an action accrue from an administrative awrad. There are strong questions of whether

one looks at the date that something was received by the party or actually the date of the award itself. Certainly, had there been knowledge of this award, an action could have been brought immediately after the September date announcing the decision. In other words, there could have been an appeal on September 10.

If one looks at one of the traditional definition of when an action occures, it is when one can proceed, when it is ripe enough to proceed with the appellate process. That certainly would argue that the earlier date would be the date. I don't think it's necessary for me to reach that decision.

Mr. Hobbs, if you are going to take this up to the Tenth Circuit, which I think would be perhaps helpful to clarify the law, they may or may not get

to that issue; but in any case, this Court feels that it is bound by the spirit and the policy and the law in United Parcel Service v. Mitchell and by the policy of the State of Colorado. The 90-day rule applies.

The motion to dismiss -- I think there is one motion to dismiss and one for summary judgment -- the motions are gratned. Unless there is anything further, the Court will be in recess.

(Thereupon, the hearing was concluded and the court was in recess at 9:15 a.m.)

REPORTER'S CERTIFICATE

I, Paul A. Zuckerman, Certified Shorthand Report and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing manner; that I thereafter reduced my shorthand

notes to typewritten form, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings described in the matter on the date set forth.

Dated at Denver, Colorado, this 17th day of February, 1982.

/s/ Paul A. Zuckerman, CSR, RPR

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1195

FRANK E. BARNETT,

Plaintiff-Appellant

v.

UNITED AIR LINES, INC., et al.,

Defendants-Appellees

Opinion filed March 13, 1984

After examining the briefs and the appellate record, this three-judge panel has determined unanimcusly that oral argument would not be of material assitance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The case is therefore submitted without oral argument.

Plaintiff Frank E. Barnett (Barnett) appeals from an order of the district court (1) granting

Defendant-Appellee United Airlines, Inc.'s (United) motion to dismiss and (2) granting Defendant-Appellee Association of Flight Attendants' (AFA) motion for summary judgment, on the grounds that Barnett's claims are barred by a Colorado ninety-day statute of limitations. United is an air carrier subject to the provisions of the Railway labor Act, 45 U.S.C. §§ 151, et seq. (1976)[1] AFA is a labor organization representing flight attendants, such as Barnett, employed by United. In his amended complaint, Barnett alleges that United breached his contractual right under the Collective Bargaining Agreement between United and AFA, and

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1 As noted later in this opinion, however, air carriers are expressly excepted from the application of § 3, 45 U.S.C. § 153. See, §§ 201 and 202, 45 U.S.C. §§ 181 (Supp. V 1981) and 182 (1976).

that AFA violated its duty to him of fair representation. Barnett argues that United improperly adjusted his seniority statuts in violation of the Collective Bargaining Agreement. Further, he claims that AFA "demonstrated bad faith and acted arbitrarily and capriciously by failing to process [his] grievance, by failing to furnish proper representation to [him] at the arbitration hearing, and by failing to advise the arbitrator of their own practice of interpreting the collective bargaining agreement to afford seniority credit for time served in temporary inflight service supervision status." R., Vol. I (Amended Complaint) at 12.

The Collective Bargaining Agreement between United and AFA controls pay rates, rules, and working conditions for

United flight attendants. Further, the Agreement established an arbitration board (System Board of Adjustment) pursuant to section 204 of the Railway Labor Act, 24 U.S.C. § 184 (1976). This Board is authorized to render final, binding decisions on grievance disputes between United and its employees.

Barnett filed his grievance purusant to the Agreement based upon his contention that United improperly adjusted his seniority status. The System Board denied Barnett's grievance in a decision dated September 7, 1978, which he received "several days later." R., Vol. I (Amended Complaint) at 12. On October 14, 1980, Barnett filed the present action in federal district court. For relief, Barnett asked the court, inter alia, to "vacate the award of the System Board of Adjustment ... and

restore the plaintiff to his proper seniority statuts."[2] R., Vol. I (Amended Complaint) at 13. The district court dismissed the action based on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), finding that the applicable statute of limitations was Colo. Rev. Stat. § 13-22-214(2) (Supp. 1982), which establishes a ninety-day limitation period for an action brought to vacate an arbitration award.

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[2] Because Barnett styled his suit in this manner and because if he were successful, the suit would effectively vacate the Board's award, we will view this as an action to vacate an arbitration award. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 61 (1981). In United Parcel, the Supreme Court noted that even though a plaintiff seeking review of an arbitration award characterizes an action in a particular manner, i.e., as one for breach of contract, "they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company." Id. at 62-63 n.4.

The issues on appeal are (1) whether the District Court erred in applying the ninety-day Colorado statute of limitations and (2) whether Barnett timely filed this action under the applicable statute. We hold that the District Court erred in applying the Colorado statute; 45 U.S.C. § 153 First (r) (two years) is the appropriate statute of limiations for this cause. We further hold, however, that Barnett failed to file this action within the requisite two-year limitations period. We will, therefore, affirm the dismissal of this action.

I.

Although air carriers are subject to most provisions of the Railway Labor

Act,[3] they are expressly excepted from § 3, 45 U.S.C. § 153 (1976) (hereinafer cited as "section 153"). See 45 U.S.C. § 181 (Supp. V 1981). Section 153 provides for the establishment of a National Adjustment Board for railroads. Specifically, 45 U.S.C. § 153 First (r) provides for a two-year limitations period for any action at law brought on an award by a division of the adjustment board. In section 204 of the Act, 45 U.S.C. § 184 (1976), Congress authorized the airline industry to establish "local" boards having the same jurisdiction exercised

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[3] Air carriers are subject to § 1, 45 U.S.C. § 151 (1976) (definitions); § 2, 45 U.S.C. § 151a (1976) (statement of purposes); §§ 4 and 5, 45 U.S.C. §§ 154 and 155 (1976) (National Mediation Board); and §§ 7, 8, and 9, 45 U.S.C. §§ 157, 158, and 159 (1976) (voluntary arbitration and emergency boards). See §§ 201 and 202, 45 U.S.C. § 181 (Supp. V 1981) and 182 (1976).

by system, group, or regional boards of adjustment authorized under section 153. In section 205 of the Act, 45 U.S.C. § 185 (1976), Congress authorized the National Mediation Board to establish, when it deems necessary, a National Board of Adjustment for air carriers similar to the railroads' national board. However, no provisions is expressly made for a limitations period governing actions at law to review air carrier board decisions.

The Supreme Court has repeatedly held that when Congess has not expressly provided a statute of limitations governing federal statutory actions, a court must apply the most "'appropriate state statute of limitations.'" United Parcel, supra at 60 (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) and Auto Workers v.

Hoosier Cardinal Corp., 383 U.S. 696, 704-705 (1966)). The district court adopted the appellees' position that United Parcel is dispositive of the issue before us. We disagree. As we will discuss, the uniqueness of the Railway Labor Act prevents the mechanical application of United Parcel to the circumstances before us.[4]

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[4] United Parcel was an action for wrongful discharge brought by an employee (a car washer) against his employer (United Parcel Service, Inc.) under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976). The employee's Union filed a grievance on his behalf, which was submitted to arbitration before a joint panel (union and company representatives) pursuant to their collective bargaining agreement. After hearing, the joint panel rendered a binding decision upholding the discharge. The employee subsequently filed an action at law under section 301(a), alleging that the Union had breached its duty of fair representation and that UPS

In Occidental Life Ins. Co. v EEOC, 432 U.S. 355, 367 (1977), the Supreme Court noted that a state statute of limitations will not be "mechanically applied" merely because the federal statute failes to expressly provide for a limitations period. The Court emphasized that "'[a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide.'"

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[4] (cont.) discharged him for reasons other than those stated, in violation of the collective bargaining agreement. United Parcel, supra at 58-59.

The Supreme Court held the employee's suit was effectively one to vacate an arbitration award. Id. at 61. Further, because Congress had failed to provide an express limitations period for section 301 actions, the "most appropriate one provided by state law" must be applied. Id. at 60. Thus, one Court held that the New York ninety-day statute of limitations for an action to vacate an arbitration award was proper -- it was consistent with the federal law policy of rapidly disposing of disputes in that sector. Id. at 63-64.

Id. (quoting Johnson v. Railway Express Agency, supra at 465). We must not borrow a state limitations period if its application would be inconsitent with federal policy. Occidental, supra (citing Johnson v. Railway Express Agency, supra; Auto Workers v. Hoosier Cardinal Corp., supra at 701; and Bd. of County Comm'rs v. United States, 308 U.S. 343, 352 (1939)). However, even when a state statute appears "appropriate," if another relevant federal statute exists that clearly reflects the interests Congress intended to protect under the federal statute in

question, we must apply it.[5] Johnson v. Railway Express Agency, supra at 462.

With this directive in mind, we hold that the two-year limitations period expressed in section 153 First (r) applies to actions at law brought to review adjustment board decisions made in the airline industry. See Gordon v. Eastern Airlines, Inc., 268 F. Supp. 210, 212-13 (W.D.Va. 1967). But see Richey v. Hawaiian Airlines, Inc., 533

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[5] In United Parcel, the Court declined to consider an argument raised in an amicus brief concerning the application of a relevant federal statute of limitations because it was not raised in the lower courts. The majority opinion in United Parcel dealt only with the limited issue of which state limitations period should be borrowed, not the propriety of such borrowing. See United Parcel, supra at 60 n. 2. For a detailed discussion of this question as it applies to section 301(a) of the Labor Management Relations Act, see United Parcel, id. at 65-71 (Stewart, J., concurring).

F. Supp. 310, 313 (M.D.Ga. 1982); Hafer v. Air Line Pilot's Ass'n Int'l, 525 F. Supp. 874, 877 (D. Hawaii 1981), aff'd, 698 F.2d 1230 (9th Cir. 1983). Although the Railway Labor Act's express purpose of settling disputes in the airline industry in a prompt and orderly manner would be served by applying the Colorado ninety-day statute, the refusal to apply section 153 First (r) would reject the specific policy decision made by Congress after it had viewed the competing interests involved. Congress determined two years as an appropriate period for seeking judicial review of railroad adjustment board awards in light of the national interests in prompt and orderly resolutions, and an employee's interest in setting aside what he feels is an improper award. Cf.

United Parcel, supra at 70 (Stewart, J., concurring).

After studying the entire Railway Labor Act[6] and its legislative history, it is clear that Congress intended the exception of section 153 from air carriers to be temporary. The "initial omission of § 153 in 1936 was merely to postpone the establishment of a National Air Transport Adjustment Baord while the airlines industry grew. It was not intended to provide an interim period of confusion and chaos." Gordon, supra at 213. See also Int'l Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682, 685-90 (1963), for a

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[6] Generally, the intent of the Act is to minimize interruption of the rail and air transportation services of the nation caused by strikes and labor disputes, whether minor or major. Gordon v. Eastern Airlines, Inc., 268 F. Supp. 210, 212 (W.D.Va. 1967); 45 U.S.C. § 151a (1976).

discussion of the history and intent of the Railway Labor Act. Thus, the interests balanced by Congress when it enacted section 153 First (r) are identical to those which would apply to the now firmly-established airline industry. Therefore, by applying section 153 First (r) to actions involving air carriers, we would be assenting to all mandates and concerns: to enforce the intent and purpose of the entire Railway Labor Act, to establish the needed uniformity in federal procedural law for similar claims,[7] and to apply a "relevant federal

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[7] See United Parcel, supra at 70 (Stewart, J., concurring) (quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)). Because the bulk of the Railway Labor Act pertains to air carriers, to apply different state laws regarding limitations periods to similar actions under the Act would result in "confusion and chaos."

statute" in the absence of a limitations period expressed by Congress. The limitations period expressed in section 153 First (r) clearly "fit[s] hand in glove" with an action brought before an airline adjustment board under the Railway Labor Act. See United Parcel, supra at 64.

II.

We must next determine whether Barnett filed for judicial review within the time constraints of section 153 First (r). Section 153 First (r) provides:

> All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after. (Emphasis added.)

The dispositive question, therefore, is at what time the cause of

action "accrues." Because Barnett's action was filed essentially to review the Board's decision, see supra note 2, we hold that his action accrued the date that decision was rendered.[8] Gatlin v. Missouri Pacific R.R. Co., 631 F.2d 551, 554-555 (8th Cir. 1980). On September 7, 1978, the Board rendered its decision concerning Barnett, which

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[8] Barnett contends that the Colorado tolling rules, which apply to this cause, require the word "accrued" to be equated with the "rule of discovery." Appellant's Opening Brief at 18-19. Thus, Barnett urges us to hold that his cause accrued when he received the letter of the Board's decision -- "several days" after October 13, 1980. We disagree. Because we have applied section 153 First (r) to this action, the Colorado tolling and accrual rules are inapplicable. Barnett is asserting rights based on federal law and, thus, we are presented with a federal question. See Gatling v. Missouri Racific R.R.Co., 631 F.2d 551,554 (8th Cir. 1980) (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967); Steele v. Louisville & Nashville R.R.Co., 323 U.S. 192, 203-205 (1944)).

was final. See 45 U.S.C. §§ 153 First (m) and 184 (1976). Pursuant to section 153 First (r), Barnett had two years from that date to bring an action at law in federal district court. Because he filed his action for review on October 14, 1980, Barnett's action is untimely and was, thus, properly dismissed by the district court.

In sum, we reverse the district court's finding that the Colorado ninety-day statute of limitations to vacate anarbitration award, but we affirm the court's finding that Barnett

failed to file timely his action at law.[9]

REVERSED in part and AFFIRMED in part.

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[9] In rendering this opinion, we need not address the question whether the district court may review this final and binding decision of the Baord. We will note, generally, however, that the scope of review by a federal court of a decision by an airline system board of adjustment is extremely narrow. See, e.g., Hall v. Eastern Airlines, Inc., 511 F.2d 663, 663-664 (5th Cir. 1975) (citing Gunther v. San Diego & Arizona Eastern R.R. Co., 382 U.S. 257, 263 (1965)); Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 93-95 (1978), reh'g denied, 439 U.S. 1135 (1979) (railroad adjustment boards).

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1195

FRANK E. BARNETT,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., et al.,

Defendants-Appellees.

Opinion filed June 21, 1984

The court does hereby grant appellant's petition for rehearing, recall the mandate, withdraw the opinion in Barnett v. United Air Lines, Inc., 729 F.2d 693 (10th Cir. 1984), vacate the judgment, and render this Opinion on Rehearing in lieu thereof.

Plaintiff Frank E. Barnett appeals from an order of the district court (1) granting Defendant-Appellee United Airlines, Inc.'s (United) motion to dismiss and (2) granting

Defendant-Appellee Association of Flight Attendants' (AFA) motion for summary judgment, on the grounds that Barnett's claims are barred by a Colorado ninety-day statute of limitations. United is an air carrier subject to the provisions of the Railway Labor Act (RLA), 45 U.S.C. §§ 151 et seq. (1976).[1] AFA is a labor organization representing flight attendants, such as Barnett, employed by United. In his amended complaint, Barnett alleges that United violated his contractual right under the Collective Bargaining Agreement between United and AFA, and that AFA breached its duty to him of fair representation. Barnett

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[1] Air carriers, however, are expressly excepted from the application of § 3, 45 U.S.C. § 153. See §§ 201 and 202, 45 U.S.C. §§ 181 (Supp. V 1981) and 182 (1976).

argues that United improperly adjusted his seniority status in violation of the Collective Bargaining Agreement. Further, he claims that AFA "demonstrated bad faith and acted arbitrarily and capriciously by failing to process [his] grievance, by failing to furnish proper representation to [him] at the arbitration hearing, and by failing to advise the arbitrator of their own practice of interpreting the collective bargaining agreement to afford seniority credit for time served in temporary inflight service supervision status." R., Vol. I (Amended Complaint) at 12.

The Collective Bargaining Agreement between United and AFA controls pay rates, rules, and working conditions for United flight attendants. Further, the Agreement estabished an Arbitration

Board (System Board of Adjustment) pursuant to § 204 of the RLA, 45 U.S.C. § 184 (1976). This board is authorized to render final, binding decisions on grievance disputes between United and its employees.

Barnett filed a grievance pursuant to the Agreement based upon his contention that United improperly adjusted his seniority status. The Board denied Barnett's grievance in a decision dated September 7, 1978, a decision of which Barnett was first notified by a letter dated October 13, 1978, which he received "several days later." R., Vol. I (Amended Complaint) at 12. On October 14, 1980, Barnett filed the present action in federal district court where the court dismissed it based on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). The

district court found that the applicable statute of limitations was Colo. Rev. Stat. § 13-22-214(2) (Supp. 1982), which establishes a ninety-day limitation period for an action brought to vacate an arbitration award. The district court found Mitchell controlling apparently because Barnett styled his suit in a manner in which he requested the award of the Board to be set aside (see R., Vol. I (Amended Complaint) at 13), and a successful suit would have effectively vacated the award. See R., Vol. II at 2-4; United Parcel Service, Inc. v. Mitchell, supra at 61.

The issues on appeal are (1) whether the district court erred in applying the ninety-day Colorado statute of limitations and (2) whether Barnett timely filed this action under the applicable statute. We hold that the

district court erred in borrowing the Colorado statute; § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b) (1982) (six months), is the appropriate statute of limitations for this cause. We further hold, however, that Barnett failed to file this action within the requisite six-month limitations period. We will therefore affirm the dismissal of this action.

I.

Background

Because the instant case arose under the RLA, a brief explanation of the Act and Barnett's claim will be helpful. By enacting the RLA, Congress intended to provide a separate and distinct statutory scheme for labor disputes arising in two vital national industries, i.e., the rail industry and

the air carrier industry. Labor disputes between parties in other industries are governed by the NLRA. Generally, the RLA recognizes two types of disputes: (1) "major" disputes, which relate to the formation of collective bargaining agreements or efforts to secure them; and (2) "minor" disputes, which involve the interpretation of a collective bargaining agreement, the existence of which is not in dispute. See Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711, 723 (1945); Transport Workers Union of America v. American Airlines, Inc., 413 F.2d 746, 748 (10th Cir. 1969); De La Rosa Sanchez v. Eastern Airlines, Inc., 574 F.2d 29, 31 (1st Cir. 1978). 45 U.S.C. § 184 mandates that air carriers and their employees, acting through their representatives, establish system

boards of adjustment to resolve the minor disputes. Machinists v. Central Airlines, supra. See also Transport Workers v. American Airlines, supra. When an aggrieved party appeals an adjustment board decision to federal district court, the findings and order of the board are conclusive against the parties unless (1) the board failed to comply with the requirements of the RLA, (2) the board lacked jurisdiction, or (3) there was fraud or corruption by a member of the board. 45 U.S.C. §§ 153(q) and 184 (1976).

It is well established, therefore, that decisions by adjustment boards which merely interpret collective bargaining agreements are conclusive and binding on the parties; no federal or state court has jurisdiction to review such a determination by an adjustment

board. See, e.g., Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 94 (1978), reh'g denied, 439 U.S. 1135 (1979); Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272, 275 (D.C.Cir. 1980); De La Rosa Sanchez v. Eastern Airlines, supra at 32. Because Barnett claims that United beached the Collective Bargaining Agreement regarding the seniority status provisions, the Board's decision merely involved its own interpretation of the Agreement. This is precisely the type of dispute Congress contemplated to be conclusively resolved in a prompt manner by an adjustment board. See Union Pacific R.R. Co. v. Sheehan, supra at 94; Brotherhood of Locomotive Fireman and Enginemen v. Central of Georgia Ry. Co., 199 F.2d 384, 385 (5th Cir. 1952), cert. denied, 345 U.S. 908 (1953). Hence, the

district court would have been without jurisdiction to review that claim standing alone.

However, by styling his suit as a hybrid involving both a contract and a fair representation claim, Barnett is potentially able to challenge the propriety of the Board's decision. If an employee can estabish that his union breached its implied duty of fair representation, then even a binding decision of the board can be set aside if the breach seriously undermined the integrity of the arbitral process. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 299 (5th Cir. 1981), cert. denied, 454 U.S. 892 (1981). Thus, if Barnett could show that AFA's alleged breach reached this level, the district court could

also entertain jurisdiction on the breach of contract claim.[2] See Del Casal v. Eastern Airlines, supra at 298-300.

II.

Statute of Limitations: Applicability of DelCostello v. International Brotherhood of Teamsters

Inasmuch as we have established that Barnett has a potentially valid claim on the hybrid nature of his action, we must now determine the appropriate limitations period within which that claim must be brought. In the instant case, there is no express

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[2] Of course, just as with the district court, it is not necessary for us to decide the merits of Barnett's claims at this preliminary stage. We discuss this jurisdictional question only for the limited purpose of showing the potential viability of a hybrid claim such as that presented by Barnett.

statute of limitations provided in the RLA for suits in the air carrier industry brought by an employee either against his employer for breach of the collective bargaining agreement or against his union for breach of the duty of the duty of fair representation. First, it is clear from the discussion above that a sole claim involving an alleged breach of a collective bargaining agreement may not be maintained in federal court. Hence, there is obviously no express limitations period for such a claim. Similarly, Barnett's claim against AFA is not controlled by an express limitations period. Although it is well established that an action for breach of duty of fair representation between parties subject to the RLA is implied from 45 U.S.C. §§ 151 and 152, see,

eg., Vaca v. Sipes, 386 U.S. 171, 177 (1967); Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192, 199 and 202-03 (1944), these sections do not provide expressly for a limitations period. Hence, we are required to borrow an appropriate statute of limitations.

During the pendency of this appeal, the Supreme Court decided the case of DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 103 S.Ct. 2281 (1983). The Court in DelCostello held that where an employee brought an action under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., against both his employer for breach of the collective bargaining agreement (19 U.S.C. § 185) and his union for breach of the duty of fair representation, the suit was governed by

the six-month period of limitations mandated in § 10(b) of the NLRA, 29 U.S.C. § 160(b). Although the instant case does not arise under the NLRA, we nonetheless hold that on the particular facts of this case, where Barnett made claims against his employer and his union similar to those in DelCostello, the rationale of DelCostello requires the application of the six-month period under § 10(b) of the NLRA to Barnett's cause of action.

The Supreme Court has repeatedly held that when Congress has not expressly provided a statute of limitations governing federal statutory actions, a court must apply the most "'appropriate state statute of limitations.'" United Parcel Service, Inc. v, Mitchell, supra at 60 (quoting Johnson v. Railway Express Agency, Inc.,

421 U.S. 454, 462 (1975) and Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966)). This has been the approach followed by some courts when determining a limitations period for a duty of fair representation claim under the RLA. See Price v. Southern Pacific Transportation Co., 586 F.2d 750, 752-53 (9th Cir. 1978); Brotherhood of Locomotive Firemen and Enginemen v. Mitchell, 190 F.2d 308, 313 (5th Cir. 1951); Gainey v. Brotherhood of Railway and Steamship Clerks, 275 F. Supp. 292, 306 (E.D.Pa. 1967), aff'd on other grounds, 406 F.2d 744 (3rd Cir. 1968), cert. denied, 394 U.S. 998 (1969). However, based on the Supreme Court's recent directives in DelCostello and Occidential Life Ins. Co. v. EEOC, 432 U.S. 355 91977), we decline to borrow an

appropriate state limitations period in the instant case.

In Occidental, the Court noted that a state statute of limitations will not be "mechanically applied" merely because the federal statute fails to provide expressly for a limitations period. Id. at 367. The Court emphasized that "'[a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide.'" Id. (quoting Johnson v. Railway Express Agency, supra at 465 ). For example, we must not borrow a state limitations period if its application would be inconsistent with federal policy. Occidental, supra (citing Johnson v. RAilway Express Agency, supra; Auto Workers v. Hoosier Cardinal Corp., supra at 701; and Bd. of County Comm'rs v. United States, 308 U.S. 343, 352 (1939)).

Even when a state statute appears "appropriate," if another relevant federal statute exits that clearly reflects the interests Congress intended to protect under the federal statute in question, we must apply it.[3] Johnson v. Railway Express Agency, supra at 462.

The Court in DelCostello reaffirmed its holding in Occidental that a court must borrow express limitations periods from related federal statutes when state statutes may be unsatisfactory for the enforcement of federal law. 103 S.Ct.

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[3] In Mitchell, the Court declined to consider an argument raised in an amicus brief concerning the application of a relevant federal statute of limitations (§ 10(b) of the NLRA) because it was not raised at any stage of the proceedings. The majority opinion in Mitchell dealt only with the limited issue of which state limitations period should be borrowed, not the propriety of such borrowing. See 451 U.S. at 60 n.2.

at 2289. The Court held that the six-month statute of limitations expressly provided for by § 10(b) of the NLRA should apply to a hybrid beach of contract/duty of fair representation claim brought pursuant to that Act; a breach of the implied duty of fair representation is most analogous to an "unfair labor practice," which is actionable before the National Labor Relations Board under § 10 of the NLRA. id. at 2293. The Court reasoned that the § 10(b) limitations period reflects the competing interests at stake in such a hybrid claim brought under the NLRA.

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an

> unjust settlement under the collective-bargaining system.

Id. at 2294 (quoting United Parcel Service, Inc. v. Mitchell, supra at 70 (Stewart J., concurring)).

We find that the identical competing interests recognized in DelCostello are present in the instant action brought under the RLA. Section 10(b) of the NLRA is similarly relevant to a hybrid breach of contract/duty of fair representation claim brought under the RLA; thus, the reasoning and analysis of DelCostello control in the instant case. An employee like Barnett, therefore, who files such a hybrid claim under the RLA in federal district court, must do so within the six-month period

provided in § 10(b) of the NLRA.[4] Welyczo v. U.S. Air, Inc., No. 83-7976 (2nd Cir. 1984).

III.

Timeliness of Filing

We must next determine whether Barnett filed this action within the time contraints of § 10(b). Because Barnett brought his action essentially to review the propriety of the Board's decision based on the alleged unfair

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[4] In rendering this decision, we express no opinion about the proper limitations period to be applied to other possible "hybrid" claims brought by an employee subject to the RLA. Our decision is limited to the particular context of "hybrid breach of contract/ duty of fair representation" claims made by an employee pursuant to the RLA. The reasoning applied by the Court in DelCostello regarding the appropriate limitations period to borrow when two independantly viable claims are combined might militate against borrowing the § 10(b) period in another type of "hybrid" situation brought under the RLA. See 103 S.Ct. at 2292.

representation by AFA at the hearing, we hold that he was required to file the action within six months of the date the Board rendered its decision. Cf. Butler v. Local Union 823, Internat'l Brotherhood of Teamsters, 514 F.2d 442, 449-50 (8th Cir. 1975), cert. denied, 423 U.S. 924 (1975). Because the Board rendered its decision on September 7, 1978, Barnett was required to file the instant action by March 7, 1979. Barnett filed the action, however, on October 14, 1980, clearly beyond the six-month limitations period. Thus, the district court properly dismissed Barnett's complaint.

REVERSED in part and AFFIRMED in part.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 82-1195

FRANK E. BARNETT,

Plaintiff-Appellant,

v.

UNITED AIRLINES, INC., et al.,

Defendants-Appellees.

July 10, 1984

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS, Clerk.